IN THE

Supreme Court of the United States.

OCTOBER TERM, 1941.

No. 798.

THE SIOUX TRIBE OF INDIANS, PETITIONER,

v.

THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR THE SIOUX TRIBE OF INDIANS, Petitioner.

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BRIEF FOR THE SIOUX TRIBE OF INDIANS, Petitioner.

OPINION BELOW.

The opinion of the Court of Claims is not yet reported.

JURISDICTION.

The judgment of the Court of Claims, to be reviewed, was entered April 7, 1941 (R. 30). Motion for new trial was denied October 6, 1941 (R. 30–31). The petition for writ of certiorari was filed December 12, 1941; granted February 9, 1942. The jurisdiction of the Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

STATEMENT.

The petitioner comprises those Indians or their descendants of the Sioux Tribe who were parties to the Treaty of April 29, 1868 (15 Stat. 635). That treaty set apart a permanent reservation for the Sioux Tribe, the easterly boundary of which was the east bank of the Missouri River, but

including two small reservations on the east bank of the river (now the Crow Creek Reservation).

The treaty further provided for the cession of all lands east of the Missouri River to the United States, except Crow Creek Reservation.

The proposed treaty included the bands of the Sioux Tribe living on the east side of the Missouri River. These were the Upper Yanktonai and the Lower Yanktonai bands of Sioux Indians. They objected to the terms of the treaty but signed when they were assured by the Treaty Commissioners that an effort would be made to extend the permanent reservation so as to include the James River country east of the Missouri River. The Yanktonai bands, however, did not move onto the permanent reservation but remained in the area east of the Missouri River.

By three Executive Orders in 1875 and one in 1876 (R. 9–14) lands on the easterly side of the Missouri River were "withdrawn from sale and set apart for the use of the several tribes of the Sioux Indians as an addition to their present reservation in said territory" (Dakota). The Yanktonai bands, in common with the other bands of the Sioux Tribe, continued to use and occupy the territory east of the Missouri River covered by the Executive Orders.

In 1879 and in 1884, by Executive Orders (R. 16, 18), all of the land added by the previous Executive Orders was restored to the public domain. The Sioux Indians living on the east side of the Missouri River were moved to the west side of the Missouri River except a small number of the Lower Yanktonai band, which was removed to the Crow Creek Indian Reservation.

The petitioner claims that the Executive Orders of 1875 and 1876 gave the Sioux Tribe the same right to the lands added to the permanent reservation as the Treaty of 1868 granted to the Sioux Tribe in the permanent reservation. The Sioux Tribe was never consulted in regard to the orders restoring these lands to the public domain. The tribe has never received compensation in any form or in any amount for the property right in the lands which were taken from them by the Executive Orders of 1879 and 1884. The area involved is 5,667,016.74 acres (R. 5).

Status Involved.

The material provisions of the Jurisdictional Act under which this cause of action is brought are as follows (Act of June 3, 1920, 41 Stat. 728):

> "That all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon.
>
> "Sec. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding lapse of time or statutes of limitations, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums heretofore paid or expended for the benefit of said tribe or any band thereof. The claim or claims of the tribe or band or bands thereof may be presented separately or jointly by petition, subject, however, to amendment, suit to be filed within five years after the passage of this Act; and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant, and any band or bands of said tribe or any other tribe or band of Indians the court may deem necessary to a final determination of such suit or suits may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys, employed by said Sioux Tribe or any bands thereof, shall set forth all the facts on which the claims for recovery are based, and said petition shall be signed by the attorney or attorneys employed, and no other verification shall be necessary. Official letters, papers, documents, and public

records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said tribe or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said tribe or bands of Indians." (R. 2-3.)

The material provisions of the Treaty of April 29, 1868 (15 Stat. 635) are as follows:

"Article 2: The United States agrees that the following district of country, to wit, viz. commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided."

"Article 12. No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by

the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in article 6 of this treaty."

The material provisions of the Executive Orders adding lands to the permanent reservation of the Sioux Tribe are as follows:

"Commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same; thence east with said parallel of latitude to the ninety-ninth degree of west longitude; thence south with said degree of longitude to the east bank of the Missouri River; thence up and with the east bank of said river to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians, as an addition to their present reservation in said Territory."

(January 11, 1875. Kappler, Vol. 1, 898.)

"Commencing at a point where the one hundred and second degree of west longitude intersects the forty-sixth parallel of north latitude; thence north on said one hundred and second degree of longitude to the south bank of the Cannon Ball River; thence down and with the south bank of said river to a point on the east side of the Missouri River opposite the mouth of said Cannon Ball River; thence down and with the east bank of the Missouri River to the mouth of Beaver River; thence up and with the south bank of Beaver River to the one hundredth degree of west longitude; thence south with said one hundredth degree of longitude to the forty-sixth parallel of latitude; thence west with said parallel of latitude to the place of beginning, be and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians, as an addition to their present reservation in said Territory."

(March 16, 1875. Kappler, Vol. 1, 884.)

"It is hereby ordered that that portion of the public domain in the Territory of Dakota lying south of an east and west line from the northwest corner of the Yankton Indian Reservation to the ninety-ninth degree of longitude, and between said longitude and the Missouri River on the west and the Yankton Indian Reservation on the east,

be, and the same hereby is, withdrawn from sale and settlement, and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said territory."

(May 20, 1875. Kappler, Vol. 1, 898.)

"Commencing at a point on the south bank of Beaver River, intersected by the one hundredth degree of west longitude; thence in a direct line to the east corner of the Fort Rice Military Reservation; thence in a southwestern direction along the said military reservation to the east bank of the Missouri River; thence with the east bank of the Missouri to the mouth of Beaver River; thence up and with the south bank of Beaver River to the place of beginning, be, and the same hereby is withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory."

(November 28, 1876. Kappler, Vol. 1, 884.)

The material provisions of the Executive Orders restoring to the public domain the land last above described are as follows:

"It is hereby ordered that all that portion of the Sioux Indian Reservation in Dakota Territory created by Executive orders dated January 11, March 16, and May 20, 1875, and November 28, 1876, lying within the following-described boundaries, viz: Beginning at a point where the west line of the Fort Randall Military Reservation crosses the Missouri River; thence up and along said river to the mouth of American Creek; thence up and along said creek to the ninety-ninth degree of west longitude; thence south along said degree to a point due west from the northwest corner of the Yankton Indian Reservation; thence due east to the northwest corner of said reservation; thence due south to the north boundary line of Fort Randall Military Reservation; thence following said boundary line northwesterly to the northwest corner of said military reservation; thence south on the west boundary line of said reservation to the place of beginning. And also the following-described land: Beginning at the east bank of the Missouri River at the mouth of Medicine Knoll Creek; thence up and along the Missouri River to the boundary line of Fort Sully Military Reserva-

tion; thence northeasterly along said boundary line to the southeast corner of said military reservation; thence northwesterly along the boundary line of said reservation to the northeast corner thereof; thence due north to the east bank of the Missouri River; thence up and along the east bank of said river to the mouth of the Bois Cache; thence due north to the east bank of said river to the south line of township 129 north; thence east along said township line to the line between ranges 78 and 79 west; thence north along said range line to Beaver Creek, or the north boundary line of the reservation set aside by Executive order of March 16, 1875; thence west along said creek to the east bank of the Missouri River; thence up and along said east bank to the southeast corner of Fort Rice Military Reservation; thence northeasterly along said military reservation to the east corner of said reservation; thence in a direct line to a point on the south bank of Beaver Creek where said creek is intersected by the one hundredth degree of west longitude; thence south with said one hundredth degree of longitude to the forty-sixth parallel of north latitude; thence east with said parallel of latitude to the ninety-ninth degree of west longitude; thence south with said degree of longitude to its intersection with the north boundary line of the old Sioux or Crow Creek Reservation; thence west along the north boundary line of said reservation to the eastern boundary line of the old Winnebago Reservation; thence north along said east line to the northeast corner of said Winnebago Reservation; thence west along the north boundary line of said reservation to the middle channel of Medicine Knoll Creek; thence down the middle channel of said creek to the place of beginning, be, and the same hereby is, restored to the public domain."

(August 9, 1879. Kappler, Vol. 1, 889.)

"It is hereby ordered that the lands embraced within the three existing Executive additions to the Great Sioux Reservation, in Dakota, east of the Missouri River, viz, the one opposite the Standing Rock Agency, the one opposite the mouth of Grand River and the site of the old Grand River Agency, and the one opposite the mouth of Big Cheyenne River and the Cheyenne River Agency, be, and the same are hereby, restored to the mass of the public domain, the same being no longer needed for the purpose for which they were withdrawn from sale and settlement."

March 20, 1884. Kappler, Vol. 1, 884.)

The material provisions of the statutes governing the sale of liquor to Indians and the introduction of liquor into the Indian country are as follows:

"That if any person shall sell, exchange, give, barter, or dispose of any spirituous liquor or wine to any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States, or shall introduce or attempt to introduce any spirituous liquor or wine into the Indian country, such person, on conviction thereof before the proper district court of the United States, shall be imprisoned for a period not exceeding two years, and shall be fined not more than three hundred dollars: PROVIDED, HOWEVER, That it shall be sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country, if it be proved to be done by order of the War Department or of any officer duly authorized thereto by the War Department."

(Act of February 13, 1862. 12 Stat. 339.)

"Sec. 2139. No ardent spirits shall be introduced under any pretense, into the Indian country. Every person, except an Indian, in the Indian country, who sells, exchanges, gives, barters, or disposes of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or agent, or introduces or attempts to introduce any spirituous liquor or wine into the Indian country, shall be punishable by imprisonment for not more than two years, and by a fine of not more than three hundred dollars. But it shall be a sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country, that the acts charged were done by order of or under authority from the War Department, or any officer duly authorized thereunder by the War Department."

(United States Revised Stats. 1873, Act of June 22, 1874. 18 Stat. Vol. 1, 113.)

"Section twenty one hundred and thirty nine is amended by striking out, in lines two and three, the words 'except an Indian in the Indian country.'"

(Act of February 27, 1877, 19 Stat. 244.)

AN ACT

To Revise and Consolidate the Statutes of the United States, in Force on the First Day of December, anno Domini, One Thousand Eight Hundred and Seventy-three.

"Sec. 2139. No ardent spirits shall be introduced, under any pretense, into the Indian country. Every person [except an Indian, in the Indian country][1] who sells, exchanges, gives, barters, or disposes of any spirituous liquors or wine to any Indian under the charge of any superintendent, or agent, or introduces or attempts to introduce any spirituous liquor or wine into the Indian country, shall be punishable by imprisonment for not more than two years, and by a fine of not more than three hundred dollars. But it shall be a sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country, that the acts charged were done by order of or under authority from the War Department, or any officer duly authorized thereunto by the War Department."

(United States Revised Statutes, 2nd Ed., 1878, p. 373.)

Questions Presented.

1. Whether the Sioux Tribe of Indians by virtue of the Executive Orders of January 11, 1875, March 16, 1875, May 20, 1875, and November 28, 1876, obtained title to and a vested interest in the lands by said orders added to the permanent reservation created by the Treaty of April 29, 1868 (15 Stat 635), such that said title and interest could not be taken from the Sioux Tribe without payment of just compensation.

2. Whether the Executive Orders of August 9, 1879, and of March 20, 1884, restoring to the public domain the area previously set apart for the use of the Sioux Tribe, and attached to as a part of the permanent reservation of said tribe, is such a taking of private property for public use as to require the payment of just compensation under the Constitution.

[1] Note: The words shown in brackets are in italics. "The portions of the statutes repealed are printed in italics and included in brackets." Geo. S. Boutwell, Commissioner. (U. S. R. S., 2nd Ed., 1878, p. 5.)

3. Whether an Executive Order withdrawing from the public lands a specified area and attaching such area to an existing Indian treaty reservation, in terms conforming to the terms of a treaty providing for such addition, vests in the Indian tribes such an interest in the lands covered by the Executive Order that the Indian Tribe can not be divested of such interest without payment of just compensation.

4. Whether the Congress, by the Act of June 30, 1919, which expressly prohibited the creation of, or additions to, Indian reservations by Executive Order from and after the date of the act, so recognized the prior Executive practice and so acquiesced in the issuance of all previous Executive Orders similar to those prohibited by the act as to validate all such previous orders, especially in view of the fact that the Act of June 30, 1919, did not revoke nor question such Executive Orders issued prior to that date.

5. Whether the plain and unambiguous terms of a grant are subject to the undisclosed purposes of the grantor and thereby subject the grant to revocation at will by the grantor, even though it is shown that the reason for the revocation did not in fact exist at the time of revocation.

SPECIFICATIONS OF ERROR TO BE URGED.

1. The court erred in holding that the Sioux Tribe did not obtain by the Executive Orders any interest for which the United States are responsible, either in law or in equity in the following holding:

> "The Sioux Nation did not get by these four Executive Orders, adding land to their permanent reservation, any interest for which the Government is responsible either in law or in equity." (R. 28.)

2. The court erred in construing the words of the Treaty of April 29, 1868 (*supra*) in the following holding:

> "The use of the words in the treaty 'or in such territory as may be added to this reservation for the use of said Indians' clearly intended such lands which may be added

thereto, either by treaty, which was the sole way by which Congress dealt with these Indian Tribes up to 1871, or by act of Congress after 1871. Congress did not intend by these words to vest in the President the fee to the public domain, or the power to dispose of the title to it, a power which was, under the Constitution, in the Congress alone." (R. 27.)

3. The court erred in holding that Congressional ratification by a specific act of Congress was necessary to give full effect to the Executive Orders here in question in the following holding:

"It would have required some act of Congress by prior legislation, or subsequent ratification of the Executive Orders, in order to divest the United States of its title to the land and place it elsewhere." (R. 27.)

4. The court erred in holding that the additions to the Sioux Reservation made by the Executive Orders was "of a temporary nature," in the following holding:

"In the case before us, although the Executive Orders did not contain words of a temporary nature, nevertheless, the recommendation of the Commissioner of Indian Affairs to the Secretary of the Interior, on which these Executive Orders were based, showed that the additions were solely for the purpose of regulating the liquor traffic on the Missouri River and the protection of these Indians on their permanent reservation from the injurious and harmful effects of such traffic." (R. 27.)

5. The court erred by taking into consideration the several errors heretofore set out and by process of adding error to error, reaching the conclusion that the undisclosed intent of the United States left with the United States the power to revoke the Executive Orders of 1875 and 1876 and that the several Executive Orders were temporary in their nature and could be withdrawn at any time, in the following holding:

"Taking all these matters into consideration, it seems clear that in issuing the Executive Orders of 1875 and 1876, which added some six million and odd acres to the

Sioux treaty reservation, it was intended as a temporary expedient in order to protect the Indians from the injurious and nefarious liquor traffic, and the orders were temporary in their nature and could be withdrawn at any time and were withdrawn in 1879 and 1884." (R. 30.)

6. The court below erred in three instances in making a distinction between the expression "use" contained in the Executive Orders and the words "use and occupation," as set out in the following holdings:

"In these four Executive Orders there is the expression 'use' of the several tribes and not the words 'use and occupation' or 'use or occupation' as expressed in the treaty." (R. 23.)

"The actual fee is always in the United States but the use of the terms 'use and occupation,' 'use or occupation,' or 'occupation' carry such an equitable title in the Indians that the Congress of the United States has always recognized that compensation should be given the Indians for the lands when they are taken." (R. 24.)

"In the instant case the Executive Orders of 1875 and 1876 were withdrawn in 1879 and 1884. For over sixty years the Sioux Indians have not had the use of these lands and even during the periods from 1875 to 1879 and 1884 they had only the use which permitted hunting of buffalo and other game." (R. 29.)

7. The court erred in relying upon the statement made by the Commissioner of Indian Affairs to the effect that the Act of February 27, 1877 (19 Stat. 244), amended the United States code of 1873 in respect to the suppression of the liquor traffic in the Indian country, as set out in the following:

"In 1879, the Secretary of the Interior, who had been advised by the Commissioner of Indian Affairs, recommended that the lands, with certain exceptions, so withdrawn from settlement and sale under the four orders above mentioned, could be restored to the public domain and the liquor traffic with the Indians suppressed, under the act of February 27, 1879 (Stat. 244)." (R. 23.)

SUMMARY OF BRIEF.

The contentions of the petitioner in this brief may be summarized as follows:

1. The President had the power to issue the Executive Orders of 1875 and 1876 adding lands to the permanent Sioux Reservation as a part thereof.

2. The Executive Orders were issued in conformity with the Sioux Treaty of April 29, 1868, with no limitation as to term or tenure nor power reserved by the Executive to revoke or rescind the Executive Orders.

3. The petitioner was in actual occupation of the lands covered by the Executive Orders at and before the issuance thereof and by those orders the "use" of the lands therein described was granted to petitioner. Petitioner thereafter enjoyed the use and the occupation of the lands. No distinction can be made between "use" and "use and occupation."

4. There were various reasons for the issuance of the Executive Orders, none of which are referred to in the orders themselves.

5. If the sale of liquor was one, but not the only reason for the issuance of the Executive Orders, then that reason was founded on a misconstruction of the law prohibiting the sale of liquor to Indians. There was no change in the law respecting introduction of liquor into the Indian country or the sale of liquor to Indians which justified the issuance of the Executive Orders of 1879 and 1884 restoring the lands to the public domain.

6. The actual reason for restoring the lands to the public domain was the desire of white citizens to file homestead or other entries on the lands reserved to petitioner.

7. The Executive Orders of 1879 and 1884 took from petitioner the right to use and to occupy the lands previously reserved.

8. The taking by those orders was such a taking of private property by the United States as to require the payment of just compensation to the petitioner.

BRIEF.

1. The President had Power to Issue the Executive Orders.

Petitioner contends that the President had the power to issue the several Executive Orders here involved (January 11, 1875, March 16, 1875, May 20, 1875, November 28, 1876, R. 9, 11, 12, 13, 14). That upon the issuance of these orders the petitioner had the interest in the lands set over to petitioner by the terms of the orders.

That the President had authority at the date of the four foregoing orders to withdraw these lands and set them apart for the benefit of the Sioux Indians is settled beyond the possibility of controversy.

In *United States* v. *Midwest Oil Co.*, 236 U. S. 459, the Supreme Court had before it this same question of the power of the President to withdraw public lands from entry, which otherwise were open to entry, and to devote the lands so withdrawn to another public use. The question was not on the particular purpose of the President nor on the particular use intended by the withdrawal, but the question was on the power of the President to withdraw the lands from entry. On this question the Court said:

At page 469:

> "1. We need not consider whether, as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase. The case can be determined on other grounds and in the light of the legal consequences flowing from a long-continued practice to make orders like the one here involved. For the President's proclamation of September 27, 1909, is by no means the first instance in which the Executive, by a special order, has withdrawn lands which Congress, by general statute, had thrown open to acquisition by citizens. And while it is not known when the first of these orders was made, it is certain that 'the practice dates from an early period in the history of the government.' *Grisar* v. *McDowell*, 6 Wall. 381, 18 L. ed. 868. Scores and hundreds of these

orders have been made; and treating them as they must be (*Wolsey* v. *Chapman*, 101 U. S. 769, 25 L. ed. 920), as the act of the President, an examination of official publications will show that (excluding those made by virtue of special congressional action, *Donnelly* v. *United States*, 228 U. S. 255, 57 L. ed. 825, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913E, 710), he has, during the past eighty years, without express statutory,—but under the claim of power so to do,—made a multitude of Executive orders which operated to withdraw public land that would otherwise have been open to private acquisition. They affected every kind of land—mineral and non-mineral. The size of the tracts varied from a few square rods to many square miles, and the amount withdrawn has aggregated millions of acres. The number of such instances can not, of course, be accurately given, but the extent of the practice can best be appreciated by a consideration of what is believed to be a correct enumeration of such Executive Orders mentioned in public documents.

They show that prior to the year 1910 there have been issued

99 Executive orders establishing or enlarging Indian reservations;

109 Executive orders establishing or enlarging military reservations and setting apart land for water, timber, fuel, hay, signal stations, target ranges and rights of way for use in connection with military reservations;

44 Executive orders establishing bird reserves.

"In the sense that these lands may have been intended for public use, they were reserved for a public purpose. But they were not reserved in pursuance of law, or by virtue of any general or special statutory authority. For it is to be specially noted that there was no act of Congress providing for bird reserves or for these Indian reservations. There was no law for the establishment of these military reservations or defining their size or location. There was no statute empowering the President to withdraw any of these lands from settlement, or to reserve them for any of the purposes indicated.

"But when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain, nothing was more natural than to retain what the government already owned. And in making such

orders, which were thus useful to the public, no private interest was injured. For, prior to the initiation of some right given by law, the citizen had no enforceable interest in the public statute, and no private right in land which was the property of the people. The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large. Congress did not repudiate the power claimed or the withdrawal orders made. On the contrary, it uniformly and repeatedly acquiesced in the practice, and, as shown by these records, there had been, prior to 1910, at least 252 Executive Orders making reservations for useful, though nonstatutory, purposes."

(*United States* v. *Midwest Oil Co.*, 236 U. S. 459.)

Much more might be quoted from the decision in *United States* v. *Midwest Oil Co.* In fact the entire decision is squarely upon the point of the power of the Executive to withdraw public lands from entry. The decision is cited as controlling in *Mason* v. *United States* (260 U. S. 545). In the latter case the Court held:

"Whatever legitimate doubts existed at the time of the locations respecting the validity of the executive order were resolved by the subsequent decision of this court in *United States* v. *Midwest Oil Co.* 236 U. S. 459, 59 L. ed. 673, 35 Sup. Ct. Rep. 309, where it was held that a similar order, issued in 1909, was within the power of the Executive. Upon the authority of that case the order here in question must be held valid."

(*Mason* v. *United States*, 260 U. S. 545, 553.)

The general allotment act of February 8, 1887 (24 Stat. 388, Sec. 1) contains the following provision:

"That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his

opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:"

(Act February 8, 1887, 24 Stat. 388.)

The general allotment act ratified and confirmed Executive Orders creating Indian reservations which were in effect on the date of the act, February 8, 1887.

If the lands involved in this case had not been restored to the public domain by the Executive Orders of 1879 and 1884 (R. 16, 17, 18) the provisions of the general allotment act would have applied to these lands and the lands would have been alloted to members of the Sioux Tribe.

It is submitted that the President had the power to issue the Executive Orders here in question and that the orders were effective. The effect of the orders was to vest[1] in the Sioux Tribe, petitioner herein, the right to the use of the lands described in the Executive Orders.

2. The Executive Orders were Issued with No Limitation or Reserved Power to Revoke.

Petitioner contends that the Executive Orders of 1875, 1876 were in fact issued as they appear in this record (R. 9, 11, 12, 13, 14). The Executive Orders speak for themselves.

Following the description of the land in each Executive

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[1] The Court below held that the Executive Orders attaching lands to the Sioux permanent reservation were not effective to divest the United States of any portion of its title unless ratified by some act of Congress. We submit the ratification by a special act was unnecessary in view of the argument presented previously in this brief. However, attention is invited to a subsequent act of Congress, Section 27 of the Act of January 30, 1919 (41 Stat. 3-34). This act prohibited the creation of new Indian reservations by Executive Order.

This act recognizes the long continued practice by the Executive of the creation of new or the extension of existing Indian reservations. The act does not denounce the practice but leaves all previous Executive Orders unaffected. The act is a recognition of the practice and by the stoppage of the practice is in effect a validation of the practice so long as it was continued and prior to the date of the act.

Order are the vital words of withdrawal from sale and conveyance. In the four orders those words are as follows:

January 11, 1875 (R. 9).

"be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory."

March 16, 1875 (R. 11).

"be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory."

May 20, 1875 (R. 12).

"be, and the same hereby is, withdrawn from sale and settlement and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory."

November 28, 1876 (R. 13, 14).

"be and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory."

The effect of these orders was to convey and deliver to the Sioux Indians the "use" of the lands described in the four Executive Orders.

The orders contain no words of limitation. The absence of words of limitation can not be supplied.

Article 2 of the Treaty of April 29, 1868 (15 Stat. 635; R. 4-5) provided for the addition of lands to the permanent Sioux reservation created by that treaty in the following words:

"* * * and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon or reside in the territory described in this article, *or in such*

*territory as may be added to this reservation for the use of said Indians. * * * "* (Emphasis supplied.)

It is worthy of note that the Executive Orders of 1875–1876 (*supra*) contain the word "use," which is the word employed in Article 2 of the treaty last quoted.

Had the use granted to the petitioner been of a limited nature or for a specific purpose, then the Executive Orders could and should have so recited. Where in another situation it was found necessary to withdraw from settlement and entry an area of land and attach that area to this same, identical permanent reservation, the Executive Order specifically limits the duration of the addition. That Executive Order is as follows:

"Executive Mansion,
January 24, 1882.

"It is hereby ordered that the following-described tract of country in the State of Nebraska, viz: Beginning at a point on the boundary line between the State of Nebraska and the Territory of Dakota, where the range line between ranges 44 and 45 west of the sixth principal meridian, in the Territory of Dakota, intersects said boundary line; thence east along said boundary line 5 miles; thence due south 5 miles; thence due west 10 miles; thence due north to said boundary line; thence due east along said boundary line to the place of beginning, be, and the same is hereby, withdrawn from sale and set aside as an addition to the present Sioux Indian Reservation in the Territory of Dakota.

"*This order of reservation to continue during the pleasure of the President.* CHESTER A. ARTHUR."

(Kappler, Vol. I, p. 864–865.) (Emphasis supplied.)

Here was a clear case of an addition made for a specific purpose and the addition is limited by the wording of the Executive Order. No complaint has been made by the petitioner herein in connection with this land attached to the south side of the Sioux permanent reservation; no claim has been asserted for the subsequent restoration of this land to the public domain. The issuance of this last named Executive

Order clearly shows that the Executive and those acting under his direction knew full well how to draw an Executive Order containing a limitation. It shows that if the situation was as has been held by the Court below, and if the Executive Orders here in question were issued for a special purpose or for a limited time, then the Executive Orders of 1875–1876 (*supra*) must have so recited, which they do not.

It is submitted that the Executive Orders of 1875–1876 (*supra*), were issued in conformity with the Sioux Treaty of April 29, 1868 (*supra*); that the orders contain no limitation as to the term or tenure, nor is there any reservation of power in the Executive to revoke or rescind the Executive Orders here involved.

3. The Sioux Tribe was in Actual Occupation of the Lands, the "Use" of which was Granted by the Executive Orders.

Petitioner contends that the Sioux Tribe actually occupied the lands attached to the Sioux permanent reservation by the Executive Orders of 1875–1876 (*supra*). That said lands were so occupied prior to the making of the Treaty of April 29, 1868 (*supra*); such occupancy was continuous thereafter, including the entire period 1875 to 1879–1884, i.e. the period when the Executive Orders here involved were in force, all with the consent of the United States.

The record in this case establishes the fact that a substantial number of members of the Sioux Tribe belonging to the Upper and Lower Yanktonai Bands occupied a portion of Dakota Territory east of the Missouri River prior to the negotiation and signing of the Treaty of April 29, 1868 (*supra*). (R. 32.)

In 1873 the agent at Grand River Agency reported that the Lower Yanktonai were in camp "on the other side of the river, opposite the agency." (R. p. 32.) John Burke, the agent at Standing Rock Agency, in 1875 reported the building of a ferry boat for dispatch of agency business requiring attention on the east side of the Missouri River. (R. p. 33.) The same agent, John Burke, in 1876, at Standing Rock Agency reported that "the Lower Yanktonai have sixteen of their little

farming settlements on the east side of the Missouri River." (R. p. 33.)

Reference is made to specification of error (*ante*, p. 12). This error by the Court below consists of the holding that there is a distinction between the word "use" as employed in the Executive Orders here in question and the term frequently employed in relation to Indian lands, i.e. "use and occupation."

This is a distinction without a difference. It is submitted it was error for the Court below to make the distinction and to rely upon it. The Court below evidently concluded that the petitioner obtained something less than use and occupation for the reason that the Executive Orders say that the lands are "set apart for the *use* of the several tribes of the Sioux Indians as an addition to their present reservation in said Territory." (Art. 2, Treaty April 29, 1868, *supra.*)

The record herein shows that these same Indians, the Yanktonai bands, living on the east side of the Missouri River, were urged to rely upon the good offices of the treaty commissioners for the extension of the permanent reservation eastward from the Missouri River and including the home lands of these same Yanktonai bands. (R. 32.)

So long as some portion of the Sioux Indians remained in occupation of the lands east of the Missouri River it was not necessary to confer upon them a separate right of occupancy. This they already had. In view of the cession contained in the Treaty of April 29, 1868, it was necessary to confer upon the Yanktonai bands and the other Sioux bands the right of "use."

In its ordinary and accepted meaning the "use" of lands necessarily includes the right to go in and on and hence to "occupy" the lands. No use could be made of lands if the party having the right to use the lands could not go upon them. The term "use and occupation" adds nothing to the term "use," nor does it take anything away from it. These words, that is either "use" or "use and occupation" are not to be regarded in a technical sense and should not have been construed on the strictly technical basis adopted by the court below. It is established by the decisions of the courts beyond the necessity of citations that strict technical rules shall not

be used against uninformed, dependent people, particularly the Indian tribes.

So long as the petitioners, or part of them, had a physical occupation of the lands at the time of the issuance of the Executive Orders here in question, the grant of the "use" of the lands by the Executive Orders of 1875 and 1876 (*supra*) effected a joinder of "use" and "occupation."

It is submitted that the physical occupation of the lands here in question, together with the "use" granted by the Executive Orders effected a joinder of title in petitioner.

It is further submitted the Court below should not have recited and relied upon the distinction between the word "use" and the words "use and occupation."

4. There were Various Reasons for the Issuance of the Executive Orders.

Petitioner contends there were various reasons for the issuance of the Executive Orders here in question, which reasons are shown by the record in this case.

As set out in the last preceding section of this brief, the Sioux Tribe, or bands thereof, were in physical occupation of the lands east of the Missouri River prior to the execution of the Sioux Treaty of April 29, 1868 (*supra*) and continuously occupied that area down to 1879-1884. Routine agency business was transacted across the River,—something of a task in those days.

The Yanktonai bands, in particular, remained on and cultivated a portion of their home land on the easterly side of the Missouri River. (R. 32, 33.)

It also appears from the record that liquor vendors and other subversive elements took advantage of the terms of the Treaty of April 29, 1868, to set up shop on the eastern bank of the Missouri River, actually among the Yanktonai bands of the Sioux Tribe, there resident. (R. 37, 38, 39.)

The record shows that

Acting Agent Theodore Schwan at Cheyenne River Agency in 1878 made the following recommendation:

"The great majority live in five villages on the west

side of the Missouri River, three of which are above and two below the agency; only about one-seventh of the entire number, the most progressive, are settled at Peoria Bottom, on the east side, 15 miles below Fort Sully. * * *

"It is generally believed that these Indians would do better if they and their agency were transferred to the east side of the Missouri River, where a part of their number are already located. While for grazing purposes there is probably but little difference in the relative value of the land on the two sides of the river, for agriculture the section on the east side of and bordering the river is in every respect preferable to that on this (the west) side. The soil is more fertile; there is less alkaline matter in it. The area of tillable land is much greater, and generally the shelter afforded on the eastern side is more extensive and easy of access than that of the bluffs opposite."

(Rept. Comr. Ind. Aff. 1878, pp. 20–22.) (R. 34.)

So it appears from the record that the Yanktonai Band of Sioux Indians continued to live on the east side of the Missouri River after the making of the Treaty of 1868 and were living there with the consent of the United States at the time the Executive Orders here involved were issued, and until the Executive Orders of 1879, 1884 were issued. It also appears that the Commissioners who negotiated the Treaty of April 29, 1868 (*supra*) promised to do what they could to have the permanent reservation extended east of the Missouri River. (R. 32.) It also appears from the record that recommendation was made for the establishment of an agency on the east side of the Missouri River for the benefit of the Indians living there. It also appears that the liquor vendors were present and constituted a nuisance on the east bank of the river.

The Executive Orders, however, are clear and specific in making lands here in question a part of the permanent reservation of petitioner. There is no reference to the suppression of the liquor traffic, nor is there any reference to the actual occupation of the area by the Yanktonai Bands of the Sioux Tribe, nor is there any reference to the recommendation made for the establishment of an agency for these Indians on the east side of the Missouri River.

Where more than one purpose has been shown and where the written instrument conveying the use of the land is silent, neither the grantor nor the grantee can say that any one cause or any one recommendation is the one and only cause for the issuance of the conveyance.

On the foregoing it is submitted that there were various reasons for the issuance of the Executive Orders and that the suppression of the liquor traffic was not the sole and only purpose.

5. There was No Change in the Law Prohibiting Sale of Liquor to Indians by White Citizens.

Petitioner contends that if the sale of liquor along the eastern bank of the Missouri River was regarded as one (but not the only one) of the reasons for the issuance of the Executive Orders of 1875–1876 (*supra*), it was a reason founded on a misconstruction of the law prohibiting the sale of liquor to Indians.

The Court below held, in effect, that the sale of liquor was the sole and only basis for the issuance of the Executive Orders. This holding, petitioner says, is error on the face of the record.

The Court below held an amendment was made to the laws prohibiting the introduction of liquor into the Indian country and the sale of liquor to Indians by the Act of February 27, 1877 (19 Stat. 244).

Petitioner now points out this obvious error by the Court below.

As part of the statutes involved petitioner has set out herein the basic statute relating to the introduction of liquor into the Indian country and sale of liquor to Indians, the Act of February 13, 1862 (12 Stat. 339, *ante*, p. 8.) There is also set out Section 2139 of the revised statutes of 1873, Act of June 22, 1874. (18 Stat., Vol. 1, 113, *ante*, p. 8.) It is obvious that the code of 1873 contained an error and that that error was corected by the Act of February 27, 1877. (19 Stat. 244.) The correction is shown in Section 2139 of Code of 1878. (U. S. R. S. 2d Ed. 1878, p. 373; *ante*, p. 9.)

The statutes speak for themselves. The effect of the error in the Revised Statutes of 1873 (*supra*) may have been to give to an Indian in the Indian country the right to sell liquor to another Indian. This would presuppose that the first Indian obtained the liquor legally, which in itself is a legal impossibility. The error in the statute conferred no rights on the white bootleggers either on or off of the permanent reservation.

Each and every Sioux Indian who remained on or who visited on the lands east of the Missouri River was under the charge of the Indian Agents or agents at the agencies on the west bank of that river. The Act of February 13, 1862, (*supra*) section 2139 of the code of 1873, (*supra*) and section 2139 of the code of 1878, (*supra*) (*ante* 8–9) each prohibited the sale, exchange, gift or barter of liquor or wine to any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States.

The record shows that Indian Agent Edmond Palmer, at Grand River Agency, on the west side of the Missouri River, in 1873 reported the Lower Yanktonai "encamped on the other side of the river, opposite the agency" (R. 32). That following the drowning of the agency farmer and two Indians while ferrying the Indians' beef across the river, he engaged the steamer May Lowery to ferry these Indians and their beef across the river. (R. 32.)

Agent John Burke at Standing Rock agency in 1875 reported the construction of "another and additional ferry-boat" for "the dispatch of agency business requiring attention on the east side of the Missouri River." (R. 33.)

The same agent, Burke, in 1876, reported,—"The Indians belonging to this agency are four bands of the Sioux Tribe—Upper and Lower Yanktonai, Uncpapas, and Blackfeet. * * * The Lower Yanktonai have sixteen of their little farming settlements on the east side of the Missouri River." (R. 33.)

The enforcement officers could have prosecuted the liquor dealers occupying the lands on the east bank of the Missouri River at any time under the plain terms of the statute, even the statute containing the error.

There was, therefore, never at any time an actual basis for the addition of these lands to the Sioux reservation, as a

necessity arising out of the liquor traffic. Moreover, the statute was not changed by the elimination of the error contained in the code of 1873, which elimination was made by the Act of February 27, 1877. (*Supra.*)

It is submitted that there was no change in the law prohibiting the sale of liquor by white citizens to Indians by the Code of 1873. Further, it was error by the Court below to decide the contrary.

6. The Reason for the Restoration of the Lands to the Public Domain was the Desire of White Citizens to Obtain Petitioner's Lands.

Petitioner contends that the actual, the moving cause, for the issuance of the Executive Orders of 1879 and 1884 (R. 16, 17, 18) was the desire of white citizens to file homestead or other public land entries on the lands reserved to petitioner.

The real reason for the restoration of the lands to the public domain is shown in this record. It is in that portion of the record which the defendant below requested to be certified to this Court. It is clearly set out in defendant's exhibit No. 34. (R. 53–54.)

One John W. Street, apparently writing from Cleveland, Ohio, on May 28, 1879, voiced the desire of himself and others to settle upon lands set apart for the several Sioux bands as part of their permanent reservation. Mr. Street, as reported by E. J. Brooks, Acting Commissioner of Indian Affairs, petitioned for a modification of the eastern boundary of the Sioux Indian reservation so that he and others could settle thereon under the homestead laws.

From the record it appears that when the lands were not desirable for homestead entry it was quite proper to grant to the Sioux Tribe the "use" of the lands already occupied by these Indians. When, on the other hand, the lands became desirable, when the white citizens actually wanted the right to enter the lands under homestead or other entry, then in the view of the Court below it became expedient and proper for the Executive to rely upon a liquor statute that never had been changed and thereupon to revoke the Executive Orders

which granted to the Sioux Tribe, petitioner herein, the use of the lands here involved.

Many uses have been made of the liquor question but the use made in the instant case by the respondent and the error committed by the Court below are shining examples of the misuse of the question to avoid a promise to an innocent and dependent people and to defeat or attempt to defeat a clear right to have and receive just compensation for property taken.

It is submitted that the land hunger of white citizens was the actual cause for the taking of petitioner's lands.

7. The Executive Orders of 1879 and 1884 Took From Petitioner the Right to Use and Occupy its Lands.

Petitioner contends that the Executive Orders of 1879 and 1884 (R. 16, 17, 18) took from petitioner the right to use and to occupy the lands previously reserved and here involved.

These later orders speak for themselves. No argument is required to show the effect of those orders. The effect was an actual ouster of the Sioux Tribe from the lands east of the Missouri River.

From and after the date of the orders of 1879 and 1884 the lands here involved were open to settlement and entry under the public land laws. The Sioux Tribe had no right to those lands. The taking by the United States was absolute and final.

It is submitted that the Executive Orders of 1879 and 1884 (*supra*) took from petitioner the right to the use and occupation of the land so restored to the public domain. It is further submitted that no compensation whatever has been paid to petitioner for its lands.

8. The Taking of Petitioner's Lands was in the Exercise of the Right of Eminent Domain, for which Petitioner is Entitled to Just Compensation.

Petitioner contends that the taking by the Executive Orders of 1879 and 1884 (*supra*) was such a taking of private property

by the United States, as to require payment of just compensation to petitioner under the Constitution of the United States and the decisions of this Court.

On the question of the duration of an Indian title counsel finds no better definition than that contained in *Spalding* v. *Chandler* (160 U. S. 394, 402). In that case the Court held:

> "The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit, until such right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated."

Further in the same case the Court held:

> "As stated, the reserve was not extinguished or the rights of the Indians to the use of the tract destroyed or curtailed by those orders, and if the reservation for public uses and for the purposes of Fort Brady, made by the President's orders, was valid, the operation of those orders, so far as the Indian reserve was concerned, was clearly postponed until after the extinguishment of the reserve either by a voluntary cession to the Government, a cessation or abandonment of the use, or the arbitrary exercise by Congress of its power to appropriate the same."

There is no difference between the duration of an Indian title and the duration of the title of any citizen. Unless specifically limited by the terms of the paper writing which conveys the title, the title remains in full effect until it is conveyed (or ceded); or until it is abandoned; or until the sovereign power, the United States, exercises its right to take the title for its own purposes.

The exercise of the right of eminent domain may take and has taken various forms. In *Seaboard Air Line* v. *United States* (261 U. S. 299) the taking was by requisition under war time powers. In that case this Court held:

At p. 304:

> "Just compensation is provided for by the Constitution, and the right to it can not be taken away by statute. Its ascertainment is a judicial function. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 327, 37 L. ed. 463, 468, 13 Sup. Ct. Rep. 622.
>
> "The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. *Monongahela Nav. Co.* v. *United States, supra.* It rests on equitable principles, and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken."

At p. 306:

> "Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value, paid contemporaneously with the taking."

In *Shoshone Tribe of Indians* v. *United States* (299 U. S. 476) the United States actually took from the Shoshone Tribe and delivered over to the Arapahoe Indians a portion of the reservation set apart for the Shoshone Tribe.

In that case this Court said:

> "Title in the strict sense was always in the United States, though the Shoshones had the treaty right of occupancy with all its beneficial incidents. *United States* v. *Creek Nation, supra* (295 U. S. p. 109, 79 L. ed. 1335, 55 S. Ct. 681). What those incidents are, it is needless to consider now. Cf. *United States* v. *Cook*, 19 Wall. 591, 22 L. ed. 210; *Pine River Logging & Improv. Co.* v. *United States*, 186 U. S. 279, 46 L. ed. 1164, 22 S. Ct. 920; *United States* v. *Paine Lumber Co.*, 206 U. S. 467, 51 L. ed. 1139, 27 S. Ct. 697. The right of occupancy is the primary one to which the incidents attach, and division of the right with strangers is an appropriation of the land pro tanto, in substance, if not in form."

In that case this Court held:

> "Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare

may be exerted in many ways and at times even in derogation of the provisions of a treaty. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 564–566, 47 L. ed. 299, 305, 306, 307, 23 S. Ct. 216. The power does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation * * * ; for that would not be an exercise of guardianship, but an act of confiscation.' *United States* v. *Creek Nation*, *supra* (295 U. S. 110, 79 L. ed. 1335, 55 S. Ct. 681); citing *Lane* v. *Santa Rosa*, 249 U. S. 110, 113, 63 L. ed. 504, 506, 39 S. Ct. 185; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307, 308, 47 L. ed. 183, 190, 23 S. Ct. 115. The right of the Indians to the occupancy of the lands pledged to them, may be one of occupancy only, but it is 'as sacred as that of the United States to the fee.' *United States* v. *Cook*, *supra* (19 Wall. 593, 22 L. ed. 211); *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 47 L. ed. 299, 23 S. Ct. 216, *supra*; *Choate* v. *Trapp*, 224 U. S. 665, 671, 56 L. ed. 941, 944, 32 S. Ct. 565; *Yankton Sioux Tribe* v. *United States*, 272 U. S. 351, 71 L. ed. 294, 47 S. Ct. 142, *supra*. Spoliation is not management."

In *United States* v. *Klamath and Moadoc Tribe of Indians* (304 U. S. 119, 123) this Court held:

"It is appropriate first to observe that while the United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, that power is subject to constitutional limitations, and does not enable the United States without paying just compensation therefor, to appropriate lands of an Indian tribe to its own use or to hand them over to others. *Chippewa Indians* v. *United States*, 301 U. S. 358, 375. * * * The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i.e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking."

In the case at bar the taking from the Sioux Tribe, petitioner, is even more clear than in the last two cited cases, for the act of taking the lands of petitioner is set out in precise words in the Executive Orders of 1879 and 1884 (*supra*).

In a case decided at this term of Court; *United States* v. *Santa Fe Railroad Co.* (Adv. Ops. No. 3, October Term, 1941, L. ed. 86, p. 220) the questions before this Court included both "Indian occupancy" and "Executive Order reservation."

The Executive Order involved in this case was issued January 4, 1883. The words of withdrawal and conveyance were as follows:

> "It is hereby ordered that the following-described tract of country situated in the Territory of Arizona, be, and the same is hereby, set aside and reserved for the use and occupancy of the Hualpai Indians, namely;"
>
> (Kappler, Vol. 1. p. 804.)

The lands involved were those included in the grant to the predecessor of the Santa Fe Railroad Co. by the Act of July 27, 1866 (14 Stat. 292).

The Santa Fe Railroad Co. quit-claimed to the United States all lands claimed by it under the Act of July 27, 1866, within the Walapai Executive Order reservation. This action by the respondent left the question of Indian use and occupancy of the lands in the period prior to the Executive Order of 1883 still before the Court. As to these lands the decision required the railroad company to account for the rents and profits derived from the lands within its grant, which lands were within the Executive Order Reservation and also within the area used and occupied by the Walapai Indians prior to the grant to the railroad.

At p. 223, the Court said:

> "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." * * *
>
> "Indian 'right of occupancy is considered as sacred as the fee simple of the white.'"

At p. 228:

> "As stated in *Choate* v. *Trapp*, 224 U. S. 665, 675, 56 L. ed. 941, 946, 32 S. Ct. 565, the rule of construction recognized without exception for over a century has been that

'doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.'"

At p. 330:

"The Executive Order creating the Walapai Indian Reservation was signed by President Arthur on January 4, 1883.[1] There was an indication that the Indians were satisfied with the proposed reservation. A few of them thereafter lived on the reservation; many of them did not. While suggestions recurred for the creation of a new and different reservation, this one was not abandoned. For a long time it remained unsurveyed. Cattle men used it for grazing and for some years the Walapais received little benefit from it. But in view of all of the circumstances, we conclude that its creation at the request of the Walapais and its acceptance by them amounted to a relinquishment of any tribal claims to lands which they might have had outside that reservation * * *."

Petitioner submits on this record and the foregoing decisions of this Court, that the right to use and occupy the lands east of the Missouri River attached to, as a part of, the Sioux permanent reservation by the Executive Orders of 1875 and 1876 (*supra*) was vested in petitioner by said orders. Further that the taking from petitioner by the Executive Orders of 1879 and 1884 (*supra*) was such as to require the payment to petitioner of just compensation under the Constitution of the United States as amended:

"Nor shall private property be taken for public use, without just compensation."
(Amendments, Art. V.)

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[1] As to the validity of a reservation established by Executive Order, foot note 17, p. 230 (Idem.) refers to *U. S. v. Midwest Oil Co.*, 236 U. S. 459; *Spalding v. Chandler*, 160 U. S. 394. General Indian Allotment Act of February 8, 1887. 24 Stat. 388, S. 1; 34 Op. Atty. Gen. 181, 186–189.

CONCLUSION.

On the record, petitioner says the decision of the Court below is in error as herein set out; that the decision of the Court below should be reversed and petitioner held entitled to recover.

Respectfully submitted,

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Of Counsel:
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APPENDIX.

Two maps are attached to this brief, and with this word of explanation constitute this appendix. The maps are not referred to in the brief. They are attached for convenience and only for the purpose of showing, by map No. 1, in a general way, the location of the three principal divisions of the Sioux Indians prior to the making of the Treaty of April 29, 1868 (15 Stat. 635), and by map No. 2, also in a general way, the lands reserved to the Sioux Tribe by the Treaty of April 29, 1868, as a permanent reservation, the lands generally described as "unceded" or "hunting lands" reserved to the Sioux Tribe by the Treaty of 1868, and lastly the lands covered by the Executive Orders of 1875–1876 (which are referred to in the foregoing brief). On the small scale of the maps it is impossible to show land areas with absolute accuracy. The maps, however, counsel believes, present a reasonably accurate picture of the land area which is the subject of the foregoing brief, and, as well, the permanent reservation of the Sioux Tribe. No argument is based upon these maps, nor is there any request for conclusions based thereon. Counsel, however, feels that the maps may be of some assistance to the Court in showing the geography of the areas under discussion.

TERRITORY OF THE SIOUX TRIBE
ACT OF FEB. 28, 1877

Map No. 3

DEPARTMENT OF THE INTERIOR
U S GEOLOGICAL SURVEY

UNITED STATES

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Polyconic projection.